

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS. - NORTH

JUNE TERM, 2007

STATE OF NEW HAMPSHIRE

V.

MICHAEL ADDISON

NO. 07-S-0254

**Motion To Bar The Death Penalty (No. 5)
Because New Hampshire's Capital Sentencing Statute Imposes An Unconstitutional
Burden Of Proof With Respect To Mitigating Factors**

The Accused, Michael Addison, and his Public Defenders respectfully request that the Court enter an order barring the death penalty in this case.

INTRODUCTION

1. New Hampshire's capital sentencing statute requires a jury to disregard important information when it weighs reasons favoring the death penalty against reasons for a sentence of life imprisonment. The statute specifically excludes from the weighing process "mitigating factors" -- reasons a defendant should not be executed -- which are not proved by a preponderance of the evidence. Under our statute, even if a juror believes that there is a "fifty-fifty chance" that a certain mitigating circumstance is present, that circumstance is excluded from the weighing process. Thus, for example, the statute would exclude from the weighing process evidence of a fifty-fifty chance that the defendant's conduct resulted in part from brain damage caused by fetal brain injury or childhood abuse. Whether or not one believes such possibilities might justify sparing a person's life, it is wrong to follow a procedure which requires that they be ignored. Jurors should be permitted to weigh these possibilities for themselves. The

statute's requirement that jurors disregard those possibilities violates the New Hampshire Constitution.

FACTS AND PROCEDURAL CONTEXT

2. Michael Addison is charged with Capital Murder. The State has filed a Notice of Intent to Seek the Death Penalty. If Mr. Addison is convicted at trial of Capital Murder, his sentencing hearing will be conducted soon thereafter before the same jury. Therefore, Mr. Addison has no alternative but to raise potential sentencing issues now.

3. As set forth below, New Hampshire's current capital sentencing scheme is invalid "on its face" in all capital cases because it violates the New Hampshire Constitution.

THE CAPITAL SENTENCING STATUTE

4. New Hampshire's capital sentencing statute requires the sentencing jury to weigh aggravating factors against mitigating factors in determining whether a person should be sentenced to death. However, before the jury may weigh a mitigating factor, the defendant must prove it by a preponderance of the evidence. RSA 630:5 provides in part:

III. . . . In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in paragraphs VI and VII, or any other mitigating factor or any other aggravating factor for which notice has been provided under subparagraph I(b). . . . The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

IV. The jury shall consider all the information received during the hearing If an aggravating factor set forth in subparagraph VII(a) and one or more of the aggravating factors set forth in subparagraph VII(b)-(j) are found to exist, **the jury shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death.** Based upon this consideration, if the jury concludes that the aggravating factors outweigh the mitigating factors or that the aggravating factors, in the absence of any mitigating factors, are themselves sufficient to justify a death sentence, the jury, by unanimous vote only, may recommend that a sentence of death be imposed rather than a sentence of life imprisonment without possibility of parole. The jury, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed. (Emphasis added.)

Thus, although the statute instructs the capital sentencing jury to consider all evidence presented during the hearing, the jury's life or death decision is based on a process in which aggravating and mitigating factors are weighed against each other. In that process, jurors must disregard mitigating factors that are not proved by a preponderance of the evidence.

PROOF BY A PREPONDERANCE OF THE EVIDENCE

5. To find that something is proved by a preponderance of the evidence a juror must find that it is "probably" true, that is, that it is more likely true than not.

The most acceptable meaning to be given to the expression, proof by a preponderance of the evidence, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence.

McCormick on Evidence, vol. 2, sec. 339, p. 484 (6th ed. 2006).

6. If there are two possible findings, and a juror thinks there is an equal, or "fifty-fifty," chance of either of those findings, then there is not proof by a preponderance of the evidence.

Moffie v. Slawsby, 77 N.H. 555, 556 (1915); Gaffney v. Coffey, 81 N.H. 300

(1924); Ahern v. Eldredge Brewing Company, 88 N.H. 287 (1936); Chanaki v. Walker, 114 N.H. 660 (1974).

7. Burdens of proof normally serve as safeguards. In the most obvious example, we require proof beyond a reasonable doubt to convict someone of a crime in order to protect against the risks of erroneous convictions and wrongly depriving the innocent of their liberty. See generally In re Winship, 397 U.S. 358 (1968).

8. A burden of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." State v. Lavoie, ___ N.H. ___ (2007), quoting Addington v. Texas, 441 U.S. 418, 423 (1979). The burden of proof "may be said to reflect 'the comparative social costs of erroneous factual determinations.'" Proctor v. Butler, 117 N.H. 927, 932 (1977)(quoting In re Winship, 397 U.S. at 370 (Harlan, J., concurring) overruled on other grounds, In re Sanborn, 130 N.H. 430 (1988).

9. The preponderance of the evidence standard (which is usually used in civil cases) reflects a judgment that the risk of error is "no worse" for one side than the other. According to the New Hampshire Supreme Court,

The burden of proof allocates the risk of error. . . . Thus in the typical civil case proof by a preponderance is thought to be satisfactory because "a mistaken judgment for the plaintiff is no worse than a mistaken judgment for the defendant." C. MCCORMICK, EVIDENCE Sec. 341, at 962 (3rd ed. 1984).

In re Sanborn, 130 N.H. 430, 441 (1988).

10. By requiring a capital defendant to prove mitigating circumstances by a preponderance of the evidence, before the jury may weigh them, the legislature has made two basic decisions. First, the legislature has decided to limit mitigating factors to only those factors which are proved to more than a "fifty-fifty" probability. A juror's reasonable belief based on significant evidence that a mitigating factor may be present is nonetheless excluded from the weighing process in the absence of proof by a preponderance of the evidence. Second, the legislature has placed the burden of non-persuasion and, therefore, the risk of error with regard to proof of mitigating

factors, on the defendant whose life is at stake. As set forth below, these legislative decisions violate the New Hampshire Constitution.

REQUIRING PROOF OF MITIGATING CIRCUMSTANCES BY A PREPONDERANCE OF THE EVIDENCE VIOLATES THE NEW HAMPSHIRE CONSTITUTION

The Federal Standard Is Not The New Hampshire Standard

11. By imposing a burden of proof on mitigating factors, the New Hampshire legislature has not violated the lesser standards of the federal constitution as currently interpreted by the United States Supreme Court. In Walton v. Arizona, 497 U.S. 639 (1990), overruled on other grounds, Ring v. Arizona, 536 U. S. 584 (2002), the United States Supreme Court held that federal constitutional standards under the Eighth and Fourteenth Amendments do not bar a state from requiring a defendant in a capital sentencing hearing to prove mitigating circumstances by a preponderance of the evidence.

12. As set forth in Motion to Bar the Death Penalty No. 2, when the New Hampshire legislature copied a federal statute into New Hampshire law, the legislature chose a capital sentencing procedure designed to comply with federal constitutional standards. The legislature did not allow for the greater protections afforded by the New Hampshire Constitution.

13. The other death penalty states have not adopted a uniform practice with regard to mitigating factors and burdens of proof. Some states have declined to impose a burden of proof on mitigation evidence as permitted by Walton and the federal constitution. Others have

imposed the limitations permitted under the federal constitution.¹ See generally Acker & Lanier, "In Fairness and Mercy: Statutory Mitigating Factors In Capital Punishment Laws," 30 Crim. L. Bull. 299 (July/Aug. 1995). A number of state statutes only require that a defendant submit some evidence to justify the jury's consideration of alleged mitigating factors. See N.J. Stat. Ann. sec. 2C:11-3(c)(2)(a); Ohio Rev. Code Ann. 2929.03(D)(1); Tenn. Code Ann. sec 39-13-204(e)(1). Alabama, a very "pro-death penalty state," places the burden of simply raising a mitigating factor on the defendant, but once the issue is raised the state has the burden of disproving it by a preponderance of the evidence. See Ala. Code sec. 13A-5-45(g). The Colorado statute simply says "[t]here shall be no burden of proof as to proving or disproving mitigating factors." See Colo. Rev. Stat. sec. 18-1.3-1201(1)(d).

14. Before examining New Hampshire constitutional issues, it is worth noting that the Walton opinion itself demonstrates that the federal analysis offers little guidance on how this issue should be decided under the New Hampshire Constitution. The Walton opinion reasoned that in other situations states have been allowed to place a burden of proof upon criminal defendants without violating the federal constitution. 497 U.S. at 650-652. The Walton court pointed out that the federal constitution allows a state to burden a defendant with the obligation of proving self-defense by a preponderance of the evidence as long as the state has first established all of the elements of the offense beyond a reasonable doubt. That analogy does not

¹ Arizona, Maryland, New York, Pennsylvania and Wyoming have statutes which expressly state the preponderance of the evidence requirement. See Ariz. Rev. Stat. Ann. sec 13-703(C); Md. Crim. Law Code Ann. sec 2-303(h)(2); N.Y. Crim. Proc. Law sec. 400.27(6). Pa. Stat. Ann. tit. 42, sec. 9711(c)(1)(iii); Wyo. Stat. sec. 6-2-102(d)(i)(B). For the purposes of comparing states' methods of constitutional analysis, the opinions upholding New York's and Pennsylvania's statutes should be reviewed. In both instances the courts considered only federal constitutional issues. People v. Mateo, 664 N.Y.S. 2d 981, 1003-04 (Co. Ct. 1997); Commonwealth v. Zottlemoyer, 454 A. 2d 937, 962-663 (Pa. 1982). Obviously, in New Hampshire the analysis would be quite different.

apply in New Hampshire where, by comparison, we have chosen to impose on the State the burden of disproving self-defense beyond a reasonable doubt if the defendant introduces any evidence to support the defense. See RSA 626:7; RSA 627:1, 4; State v. McMinn, 141 N.H. 636, 645 (1997); State v. Soucy, 139 N.H. 349, 352-353 (1995); State v. Hast, 133 N.H. 747 (1990). Similarly, the Walton decision noted that the federal constitution allows states to require that a defendant prove insanity beyond a reasonable doubt if the State first proves that the elements of the offense are present. Here again, New Hampshire provides defendants greater protection by imposing the lesser clear and convincing evidence burden on defendants who raise insanity as a defense. RSA 628:2(II).

15. Thus, the New Hampshire constitutional analysis should be conducted with reference to the greater protections in the New Hampshire Constitution and in New Hampshire law generally.

All Proofs Favorable

16. A New Hampshire defendant's right to present evidence on his own behalf is greater than analogous rights of defendants in federal court and in most other states. The New Hampshire Constitution expressly protects a defendant's right to "produce all proofs that may be favorable to himself." N.H. Const., pt. 1, art. 15. The New Hampshire Supreme Court has stated that "the New Hampshire constitutional right to present all favorable proofs affords greater protection to a criminal defendant" than the federal right to due process. State v. Laurie, 139 N.H. 325, 330 (1995). There is no authority or reason to believe that this right has any less applicability at the penalty phase jury trial of a capital case, where a defendant's life is at stake, than it does in a

typical non-capital trial where the defendant confronts the lesser risks of conviction and imprisonment.²

17. Our capital sentencing statute excludes very important and very real evidence from the jury's weighing of aggravating and mitigating factors. Regardless of the facts of a particular case, there are important circumstances and factors which should be considered even though they might not be proved by a preponderance of the evidence. The possibility that a mitigating factor may be present could be very important, even if it is not "proved." For example, our statute would exclude from the weighing process:

--A fifty-fifty chance that the accused suffered brain damage as an infant.

--A fifty-fifty chance that the accused was physically assaulted and/or abandoned as a child.

--A fifty-fifty chance that the accused suffers from a serious mental illness.

--A fifty-fifty chance that the accused was impaired by drugs at the time of the offense.

Indeed, under our statute, all of these "possibilities" (and any other possible but not quite proved mitigating factors) could be present in a single case, yet all would be excluded from the process in which the jurors weigh aggravating factors against mitigating factors. That consequence of our statute simply cannot be consistent with the right to present all proofs favorable because such possibilities are "favorable proofs."

18. The decision whether to impose the death penalty is not mathematical or scientific. It is not based on the amount of evidence or even, necessarily, only on clearly established facts. If

²State v. Laurie involved the discovery after trial of the State's failure to disclose exculpatory evidence. The Court held that when favorable exculpatory evidence is not disclosed by the State, the burden is on the State to prove beyond a reasonable doubt that the non-disclosure did not contribute to the jury's guilty verdict. Federal law, in contrast, places the burden on the defendant to establish a reasonable probability that the verdict would have been different. 139 N.H. at 330.

there is a reason to spare a person's life for which there is some evidence, jurors should at least weigh that reason against the reasons favoring the death penalty. If the right to "produce all proofs favorable" means anything, it means that a defendant whose life hangs in the balance has the right to ask his jury to consider all possible reasons for sparing his life.

Due Process

19. A capital case defendant's right to due process under the New Hampshire Constitution also mandates a finding that the requirement of proving mitigating circumstances by a preponderance of the evidence is unconstitutional. Under part 1, article 15 of our constitution, "no citizen shall be . . . deprived of his life . . . but by the judgment of his peers, or the law of the land." The New Hampshire Supreme Court has long read this provision to be synonymous with a guarantee of "due process." See Petition of Bagley, 128 N.H. 275, 282 (1986).

20. When "determining whether a statutory burden of proof satisfies the due process requirement" the first question is "whether the challenged procedure concerns a constitutionally protected interest," and if so, the second question is "whether procedure at issue affords the requisite safeguards." In re Tracy M., 137 N.H. 119, 122 (1993);³ See also, McLellan, supra; State v. Haley, 141 N.H. 540 (1997).

21. The answer to the first question is obvious. Part 1, article 15 explicitly protects the right to life. McLellan, supra 146 N.H. at 114.

³In re Tracy M. concerned the burden of proof imposed on the government in abuse and neglect proceedings, whereas the issue presented in this motion involves a burden imposed on the defendant. Nevertheless, the due process principles described in In re Tracy M. are applicable here. In either instance the fundamental question is whether, through allocation of the burden of proof, the state has impinged on a constitutionally protected interest without adequate justification or safeguards.

22. In answering the second question, the New Hampshire Supreme Court has stated that it considers the following factors in deciding whether the safeguards are adequate:

- (1) the private interest affected by the official action;
- (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and
- (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

State v. Lavoie, ___ N.H. ___ (2007); In re Richard A., 146 N.H. 295, 298 (2001); State v. Haley, 141 N.H. 541, 544 (1977); Petition of Bagley, 128 N.H. 275, 282 (1986)

23. As for the first factor, the private interest affected by official action is the right to life, an interest that could not be greater and which is explicitly protected by part 1, article 15 of the New Hampshire Constitution.

24. Regarding the second factor, the question of whether a human being should be deliberately killed as punishment involves such qualitative judgments that the risk of an error is always great. The difficulty of making such decisions demonstrates that there is always a concern that the decision might be wrong. No doubt this is why some other states follow a different procedure and allow weighing of relevant mitigating factors without regard to whether they are proved by a preponderance of the evidence. McLellan, *supra*, is instructive on this point. In that case the New Hampshire Supreme Court held that the state was required to prove a sentence enhancement factor beyond a reasonable doubt. The court reasoned that the possibility that a defendant may be erroneously sentenced to life in prison necessitated a heightened burden of proof. McLellan, 146 N.H. at 114. The same concerns about the risk of an error and the

gravity of the decision demand that jurors be allowed to consider any evidence which might weigh against imposition of the death penalty.

25. Finally, and perhaps most significantly, the prosecution cannot show an interest in the challenged procedure or any real burden in following an alternative procedure. Even assuming for the sake of argument that limitations on mitigating evidence are constitutionally permissible, there are lesser standards which would address any prosecutorial concerns. For example, to the extent that the prosecution is concerned that jurors might base their decision on mitigating factors for which there is no evidence whatsoever, the law could provide that jurors may consider a mitigating circumstance if there is "some evidence" to support it. The "some evidence" test is well known to trial judges and would provide a baseline to prevent jurors from basing their decisions on pure speculation. State v. Vassar, 910 A2d 1193, 1195 (2006); State v. Lavoie, 152 N.H. 542, 547 (2005); State v. Hast, 133 N.H. 747, 749 (1990). A "some evidence" requirement for mitigating factors would eliminate any unfairness to State while allowing the jury to consider all relevant and possibly applicable mitigating circumstances.

26. For these reasons, the due process guarantee of part 1, article 15, like the all proofs favorable guarantee, prohibits the State from requiring a defendant to prove mitigating factors by a preponderance of the evidence before they are weighed against any aggravating factors.

Part 1, Articles 18 and 33

27. The New Hampshire Constitution contains a pronouncement that the "true design of all punishments [is] to reform, not to exterminate mankind," part 1, article 18, a requirement that "[a]ll penalties ought to be proportioned to the nature of the offense," part 1, article 18, and a prohibition against either cruel or unusual punishments, part 1, article 33. This express language in our constitution goes beyond the Eighth Amendment's prohibition against punishments that

are cruel and unusual. Although there have been no prior opportunities to apply these New Hampshire constitutional provisions to a statutory capital sentencing procedure, the Court should interpret these provisions as prohibiting the State from requiring proof of mitigating factors by a preponderance of the evidence.

28. If disproportionate, cruel and unusual sentences are to be avoided, a defendant who is on trial for his life should have the same kind of procedural protections as a defendant who faces the possibility of a criminal conviction and/or imprisonment. Yet, the requirement that a defendant prove mitigating factors by a preponderance of the evidence imposes greater burdens on capital defendants than those faced by defendants in non-capital cases. A defendant in a non-capital case is entitled to introduce evidence which might raise a reasonable doubt as to guilt without meeting any burden of proof. A capital defendant who desires to offer evidence which his sentencing jury might consider as mitigating should be similarly free of burdens of proof. Defendants in non-capital cases have no burden of proving by a preponderance of the evidence factors upon which leniency is sought. If we do not require the typical defendant to prove why he should not go to jail, we should not require a capital case defendant to prove why he should not die.

CONCLUSION

29. The death penalty cannot be lawfully imposed in the absence of a valid legislatively established capital sentencing procedure. The procedures established by legislature in the current statute violate the New Hampshire Constitution by excluding mitigating factors which are not proved by a preponderance of the evidence from the jury's weighing of aggravating and mitigating factors. Therefore, the death penalty may not be imposed in this case.

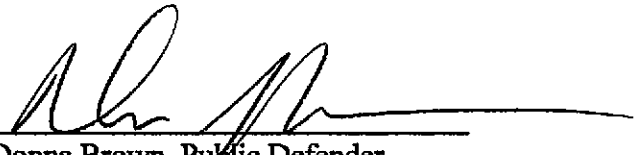
WHEREFORE the defense prays for:

- I. A hearing on this motion;
- II. An order from the Court declaring the New Hampshire capital sentencing statute, RSA 630:5, unconstitutional in violation of the New Hampshire Constitution, part 1, articles 15, 18 and 33; and
- III. An order from the Court precluding the imposition of the death penalty in this case.

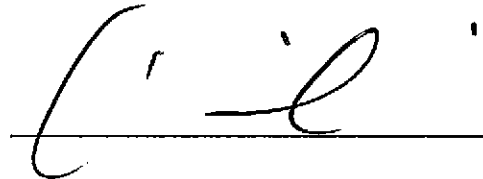
Respectfully submitted,



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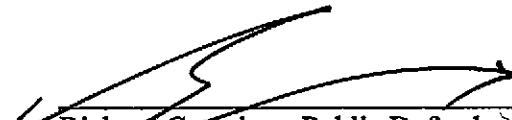
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been forwarded this 22th day of June, 2007, to the Office of the Attorney General.



Richard Guerriero, Public Defender

PILLSBOROUGH COUNTY

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